RECORD AND BRIEFS

FILED
DEC - 9 2016
OFFICE OF THE CLERK

No. 15-118

In the Supreme Court of the United States

JESUS C. HERNÁNDEZ, ET AL.,
Petitioners,

v.

JESUS MESA, JR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF MEXICAN JURISTS, PRACTITIONERS, AND SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are Mexican jurists, practitioners, and scholars, who respectfully submit this brief in support of Petitioners.

Amici consist of the Honorable Guillermo Iberio Ortiz Mayagoitia, former Chief Justice of the Mexican Supreme Court and Of Counsel of Von Wobeser y Sierra, S.C.; the Honorable Bernardo Sepúlveda Amor, former Mexican Ambassador to the United States and the United Kingdom, former Secretary of Foreign Affairs of Mexico, former Judge and Vice President of the International Court of Justice, and Professor of Law at El Colegio de México; Raúl Contreras Bustamante, Dean of the Law School of Universidad Nacional Autónoma de México (UNAM); José Joaquín Zapata Altamirano, Partner at Zapata Velasco Gómez Mont and Professor at Escuela Libre de Derecho; Pedro Salazar Ugarte, Professor and Director of the Institute of Legal Studies (Instituto de Investigaciones Jurídicas) at UNAM; Fernando Del Castillo E, Partner at Santamarina y Steta; Luis Enrique Graham, Partner at Hogan Lovells; Juan Francisco Torres Landa R, Partner at Hogan Lovells; Tania Gabriela Rodríguez Huerta, Professor at the Instituto Tecnológico Autónomo de México (ITAM); Oscar Fernando Vázquez Cardozo, Partner at Vázquez

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[1] All parties have consented to the filing of this *amici curiae* brief pursuant to Rule 37.3 of the Rules of the Supreme Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae* or their counsel made a monetary contribution to the brief's preparation or submission.

Cardozo Abogados, S.C. and Professor of Law at ITAM; Julieta Ovalle Piedra, Partner at Bufete Ovalle Favela, S.C.; Gabriel Cavazos Villanueva, Professor at the Escuela de Ciencias Sociales y Gobierno del Instituto Tecnológico y de Estudios Superior de Monterrey (ITESM); Raúl González Salas Campos, Attorney and Member of the Mexican Academy of Penal Science; Luis Manuel Jardón-Piña, Lecturer at the Law School of the Centro de Investigación y Docencia Económicas (CIDE); Juan Carlos Zamora-Müller, Attorney at Baker & McKenzie and Professor at the Law School of CIDE; and Leyla Bello-Escobar, Attorney at Baker & McKenzie.

Together, *amici* bring a wealth of experience and are well-respected experts in the fields of Mexican criminal law, civil procedure, constitutional law, and remedies.

Amici submit this brief in response to a misunderstanding of Mexican law asserted by the United States in its Brief in Opposition. Beyond *amici*'s interest in objectively correcting the record in this case, they are also some of the many members of the Mexican legal community with grave concerns about the nature, frequency, and unremedied state of violence at Mexico's border with the United States. *Amici* urge the Court to consider the consequences of failing to provide the Hernández family with a remedy.

SUMMARY OF ARGUMENT

Contrary to suggestions by the United States, a Mexican court will not be able to provide one of its citizens a remedy against Agent Mesa. A Mexican criminal court's ability to pursue an ordinary criminal,

or supplementary civil, action against any individual who is not present in Mexico would require the defendant to voluntarily submit to the criminal court's jurisdiction. Meanwhile, both state and federal codes bar a civil court's jurisdiction to hear a claim against a defendant domiciled outside Mexico, even when the injury occurs inside Mexico. Even in the unlikely event that a Mexican court could maintain jurisdiction, respect for the United States' sovereign immunity would bar any court proceedings in Mexico against Agent Mesa, as the agent of a foreign state.

ARGUMENT

The first step in analyzing whether this Court should recognize a private cause of action under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), is determining "whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007). While the United States has asserted in this case that "the Mexican courts have jurisdiction over any tort or crime arising from a fatal injury in Mexico," Brief for the United States in Opposition at 7, *Hernández v. Mesa*, No. 15-118, 2016 WL 806897, this ignores the fact that Mexican courts lack jurisdiction over *the defendant*. *Amici* submit this brief to provide the Court with a complete understanding of applicable Mexican law, specifically as to the definitive limitations that foreclose relief to the Hernández family or any similarly situated plaintiff in Mexico.

As presented in the analysis below, the Hernández family has no avenue for recourse against Agent Mesa

in Mexico because Mexican criminal and civil courts lack capacity to proceed against Agent Mesa and, even if they did have such capacity, Agent Mesa would be immune from suit in Mexico. Here, as in *Bivens*, it is "damages or nothing." *Bivens*, 403 U.S. at 410 (Harlan, J., concurring). Indeed, even if an avenue of relief were available under Mexican law, a remedy obtained there would be fruitless. Unless Agent Mesa has property in Mexico against which a Mexican judgment could be enforced, the Hernández family would not be able to enforce their judgment there, nor would they be able to enforce such a judgment in the courts of the United States.

I. A Mexican Court Has Authority to Impose a Remedy for the Unlawful Killing of a Mexican Citizen by a Foreign Citizen Only to the Extent that the Foreign Citizen Submits to the Court's Jurisdiction

As a general matter, Mexican civil courts hear cases regarding relations among natural persons, such as family law, contracts, and damages, whereas Mexican criminal courts hear cases that arise from violations of the state or federal penal code. Under ordinary circumstances, both criminal and civil courts are competent to hear claims for damages against a defendant accused of committing a tortious or criminal act.

Under the Mexican Constitution, a victim of a crime has a fundamental right to "reparation [for] the damage suffered." Political Constitution of the United Mexican States (Mexican Constitution) Art. 20(c)(iv). In order to ensure respect for this fundamental right, federal legislators, "for reasons of procedural economy,

allow criminal judges to hear civil liability actions derived from a criminal act."[2] However, the instant case presents a situation where neither a civil nor criminal court would have authority to hear a claim for damages.

A. Mexican Federal Criminal Law Precludes Criminal Proceedings Where a Defendant is Not Physically Present in Mexico

Article 2 of the Federal Criminal Code of Mexico specifies that it shall apply to "crimes that are initiated, prepared or committed abroad, when they produce or intend to have an effect in Mexico." Mexican Federal Criminal Code, Art. 2(i). Article 2 is the only basis for cross-border criminal jurisdiction under Mexican law. Because Agent Mesa's actions were initiated within Texas, and produced an effect in Mexico, the Federal Criminal Code applies to the facts of this case.

Article 4 of the Federal Criminal Code provides Mexican federal courts with the capacity to hear actions under Article 2. Specifically, a federal criminal court's capacity to hear such a case exists only when all of the following elements are present: (i) the defendant is in Mexico; (ii) the defendant has not been definitively tried in the country where he committed the crime; and (iii) the alleged infraction constitutes a crime both in

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[2] *Responsibilidad Civil. Competencia para Conocer de la Derivada del Delito*, Tribunal Colegiados de Circuito (Federal Circuit Court), Federal Judicial Weekly Report, Volume XIV, Thesis 2002190. I.4o.C.14 C (10a.), pg. 1932 (2012), http://200.38.163.178/sjfsist/Documentos/Tesis/2002/2002190.pdf.

the country where it was committed and in Mexico. Mexican Federal Criminal Code, Art. 4.

Where, as here, a federal criminal court lacks capacity to hear a case under Article 4(i) because the defendant is not physically present in Mexico, criminal proceedings that might otherwise be brought are suspended until such time as the court can obtain personal jurisdiction over the defendant. In short, the Hernández family will not have any right to seek redress against Agent Mesa in a Mexican criminal court as long as he avoids traveling to Mexico.

The United States has denied Mexico's request for extradition of Agent Mesa. The analysis presented here accordingly assumes that Agent Mesa will not travel to Mexico voluntarily, the only other means by which he could subject himself to the jurisdiction of Mexican federal criminal courts. Unless Agent Mesa travels to Mexico, any criminal proceedings against him will remain suspended—or may be dismissed in the interim—meaning that Mexican criminal courts will lack capacity to render a judgment or grant a remedy to the Hernández family. *Id.* As a result, no Mexican court has jurisdiction to impose criminal penalties on Agent Mesa, and the Hernández family is unable to pursue related private damages in a Mexican criminal court.

B. Mexican Civil Courts Do Not Have Jurisdiction over Agents of Foreign Sovereigns Who Are Not Domiciled in Mexico

When, as in the instant case, a criminal court is unable to grant damages for reasons unrelated to the

ultimate liability of the defendant, Article 34 of the Federal Criminal Code provides that the plaintiff may under certain circumstances seek damages in civil court. Mexican Federal Criminal Code, Art. 34; *see also* Mexican Federal Civil Code, Art. 1915 (providing the basis for a Mexican civil court to grant damages). Thus, a victim or his survivors may seek damages in the form of reparations for what the Mexican legal system describes as "an unlawful act." Mexican Federal Civil Code, Art. 1910.[3] The actions of Agent Mesa, as alleged in Petitioners' complaint, clearly rise to the level of a criminal offense under the Federal Criminal Code, and would therefore constitute an unlawful act.

Under the Mexican Constitution, federal courts have jurisdiction over controversies arising from the application and enforcement of federal law. Mexican Constitution, Art. 104(ii). However, when a civil controversy affects only the interests of private parties, the Mexican Constitution provides that a plaintiff may file in either federal or state court. *See id.* (providing for concurrent federal and state court jurisdiction). The "interests of private parties" include claims for damages resulting from bodily injury or death. Thus, a civil action could ordinarily be filed in either Chihuahua state court (the state where Sergio Hernández was shot and killed by Agent Mesa) or Mexican federal court. The Mexican Federal Civil Code

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[3] Mexican Federal Civil Code, Art. 1910 ("Anyone who acts unlawfully or against good customs and causes harm to another is obliged to repair the harm, unless it is proven that the damage occurred as a result of the inexcusable fault or negligence of the victim.").

and Chihuahua Civil Code are substantively similar for purposes of this case, and would both preclude Petitioners from having their day in court on their claim against Agent Mesa for the reasons set forth below. *See* Mexican Federal Civil Code, Art. 1915–16; Chihuahua Civil Code, Art. 1800–01; Mexican Federal Code of Civil Procedure, Art. 24(iv); Chihuahua Code of Civil Procedure, Art. 167(iv).

1. Mexican Civil Law Limits Jurisdiction to Courts Sitting in the Domicile of the Defendant

Federal law and Chihuahua state law both require that claims be filed with a competent authority. Mexican Federal Code of Civil Procedure, Art. 14; Chihuahua Code of Civil Procedure, Art. 161. At issue here is the standard, mandated by state and federal civil law, for there to be a "competent authority" with respect to personal private actions seeking damages. Under both the Federal Code of Civil Procedure and the Chihuahua Code of Civil Procedure, the "competent authority" for a claim sounding in personal injury or wrongful death is the court sitting in the domicile of the defendant. Mexican Federal Code of Civil Procedure, Art. 24(iv); Chihuahua Code of Civil Procedure, Art. 167(iv). That is, only a court sitting in the defendant's state of domicile is competent to hear a civil action for damages.

As a result, Mexican civil courts will inevitably lack jurisdiction to hear civil claims of the type the Hernández family has against defendants domiciled outside Mexico. *See* Mexican Federal Code of Civil Procedure, Art. 24(iv). As Agent Mesa is domiciled

outside Mexico, no Mexican civil court has jurisdiction to hear Petitioners' claim against him.

In its *amicus* brief, the Mexican government correctly states that, "when an illegal act is committed in one country and has a direct effect in another country . . . both countries have jurisdiction." Brief of the Government of the United Mexican States as *Amicus Curiae* in Support of the Petitioners at 10, *Hernández v. Mesa*, No. 15-118 (on petition for writ of certiorari) 2015 WL 5071997. However, it is necessary to distinguish between a Mexican court's jurisdiction and its capacity to proceed, which function for these purposes similarly to the distinction between subject matter jurisdiction and personal jurisdiction under U.S. law. For example, while the Federal Criminal Code grants jurisdiction to hear cases fitting the subject matter described in the Code, it also deprives Mexican courts of capacity to proceed with such cases when the defendant is not present in Mexico. This distinction explains why the Mexican government's *amicus* brief, after stating that a Mexican court could have jurisdiction, also concludes that "if Agent Mesa avoids travel to Mexico, any effective and enforceable remedy against him can only come from the U.S. courts." *Id.* at 11.

2. Mexican Law Provides Immunity to Agents of Foreign Sovereigns, and that Immunity Extends to Agent Mesa

A Mexican court is further unable to provide a remedy to Petitioners in light of the fact that Agent Mesa, as an agent of a foreign state, would be entitled to jurisdictional immunity from any civil action brought in Mexico.

In accordance with a widely accepted principle of public international law, Mexico grants jurisdictional immunity to foreign sovereigns, thereby depriving its courts of jurisdiction to sit in judgment of the acts of a sovereign power.[4] This principle, while not unlimited, applies broadly in determining what entities and individuals fall under the umbrella of a foreign sovereign. Accordingly, when a claim is levied against a foreign sovereign, an instrumentality of the sovereign, or an individual acting in his or her official capacity, the default position of Mexican courts is to grant immunity.[5]

At the time of the shooting, Agent Mesa was on duty and actively serving within the scope of his employment. Moreover, the United States exercised its prerogative to substitute itself for Agent Mesa under the Westfall Act for Petitioners' non-constitutional claims against him. On these facts, and in light of the wide scope given to sovereign immunity principles with respect to a foreign state's actors, a Mexican court would conclude that Agent Mesa had acted within the

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[4] *Inmunidad Jurisdiccional Internacional. No Es Prerrogativa Ilimitada*, Second Chamber of the Mexican Supreme Court of Justice of the Nation, Federal Judicial Weekly Report, IV Administrativa Primera Parte, Jurisprudence 1007037, pg. 141 (2011), http://sjf.scjn.gob.mx/sjfsist/Documentos/Tesis/1007/1007037.pdf.

[5] *See* Case No. 17498, Amparo en Revisión 348/2001, Second Chamber of the Mexican Supreme Court of Justice of the Nation, Federal Judicial Weekly Report, Volume XVII, pg. 55–57 (2003) (citing Loretta Ortiz Ahlf, *Mexican Practice in Immunity*, *in* Derecho Internacional Público § 7.4, pg. 129 (Harla 2d ed. 1993)), http://sjf.scjn.gob.mx/sjfsist/ Documentos/Ejecutorias/17498.pdf.

scope of his official capacity. Accordingly, a Mexican court would be obliged to immunize Agent Mesa from independent private-actor liability in light of his status as an agent of a foreign state.

II. Even Assuming Petitioners Could Obtain a Judgment from a Mexican Court, a Texas Court Would Not Enforce the Judgment Against Agent Mesa

Even if Petitioners were to obtain an adequate judgment in Mexico, it is unlikely that such a judgment would provide an enforceable remedy. Presumably, Agent Mesa does not hold property in Mexico that could be used to satisfy a Mexican judgment. Accordingly, Petitioners would need to resort to the judgment recognition and enforcement mechanisms available under the relevant U.S. state law, presumably Texas, where Agent Mesa resides. While *amici* do not purport to speak to the full contours of U.S. state and federal law, they address below two aspects of Texas law as to which the application of Mexican law is particularly relevant.

Any proceeding to enforce a Mexican judgment, whether in state or federal court, would be governed by Texas law.[6] Once a judgment creditor has filed a foreign country judgment that is, on its face, "final and conclusive and enforceable where rendered," enforcement is governed by Texas's implementation of

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[6] 28 U.S.C. § 1442(a)(1) provides federal officials with a right of removal to federal court. With respect to choice-of-law principles, a federal court sits in diversity where jurisdiction is derived from § 1442(a)(1). *See Winters v. Diamond Shamrock Chem. Co.*, 941 F. Supp. 617, 620 (E.D. Tex. 1996), *aff'd*, 149 F.3d 387 (5th Cir. 1998).

the Uniform Foreign Country Money-Judgments Recognition Act. Tex. Civ. Prac. & Rem. Code Ann. §§ 36.002, 36.001–008 (West 2012) [hereinafter Texas Recognition Act]. Although defendants bear the burden of demonstrating why such a judgment should not be enforced, the Texas Recognition Act offers ten grounds for non-recognition that, if present, preclude or otherwise counsel against enforcement of a foreign court's judgment in Texas. Texas Recognition Act § 36.005.

A number of these enumerated grounds would apply in this context, rendering the prospect of enforcement of a Mexican judgment against Agent Mesa in Texas simply implausible. The following describes those issues where Mexican law and practice bear particular relevance.

First, it is well-established that the absence of a foreign court's personal jurisdiction over the judgment debtor renders any resulting judgment void, and precludes a state or federal court from enforcing it. Restatement (Third) of Foreign Relations Law of the United States § 482(1)(b) (1987). As described above, Mexican law provides no reasonable basis for either a Mexican criminal or civil court to assert jurisdiction over Agent Mesa with respect to damages claims. Even if a court were to find grounds to exercise jurisdiction, a Texas court hearing a claim for enforcement may "scrutinize the basis for asserting jurisdiction . . . on its merits." Restatement (Third) of Foreign Relations Law of the United States § 482 cmt. c (1987).

The Texas Recognition Act also provides that a court hearing an enforcement claim has discretion to decline to enforce a foreign country judgment if the

underlying cause of action is repugnant to Texas public policy. Texas Recognition Act § 36.005; *see also Southwest Livestock & Trucking Co., Inc. v. Ramón*, 169 F.3d 317, 321 (5th Cir. 1999) (considering whether Mexican usury laws are repugnant to Texas public policy). Mexican courts will treat claims against U.S. government agents acting in their official capacities as void for lack of jurisdiction. *See supra* Part I. Accordingly, an action brought under Mexican law, and enforced in a U.S. court against that same federal official, would seem to run afoul of the United States' sovereign immunity. Unless it were within the scope of Texas public policy to enforce the judgments of foreign nations against U.S. federal agents acting in their official capacities, then enforcement of any judgment Petitioners could obtain would almost certainly violate Texas public policy.

CONCLUSION

Mexican law provides victims of cross-border violence no avenue for relief in Mexican courts against defendants like Agent Mesa. Defendants such as Agent Mesa, who are neither present nor domiciled in Mexico, are not subject to the jurisdiction of Mexican courts. Furthermore, officers of the United States acting in their official capacity are immune from suit in Mexican courts. For these reasons, the Hernández family has no remedy against Agent Mesa in the courts of Mexico.

Respectfully submitted,

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